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## THE SOCIOLOGICAL INTERPRETATION OF LAW

*"Proconsul naturali aequitate motus omnibus cognatis promittit bonorum possessionem, quos sanguinis ratio vocat ad hereditatem, licet jure civili deficiant."*

GAIUS, *libro sexto decimo ad edictum provinciale*.<sup>1</sup>

"General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise."

Mr. Justice HOLMES, in *Lochner v. New York*, (1904), 198 U. S. 76.

IT is not the purpose of this paper to essay a definition of either of the formidable words in the title. The object is rather to call attention away from the metaphysical question, what is law? to the sociological question, how may we best attain justice in the administration of law? and, by the aid of some examples from history and comparative law, to justify as legal and constitutional the sociological method of interpretation. That such justification is necessary is evident from the fact that although the dictum of Mr. Justice HOLMES in the dissenting opinion in *Lochner v. New York*, cited *supra*, was practically adopted by the United States Supreme Court in *Muller v. Oregon*,<sup>2</sup> in which Mr. Justice BREWER gave the apparently unanimous conclusion of the court, nevertheless, in the case of *Bunting v. Oregon*,<sup>3</sup> on a similar state of facts, a dissent was expressed by Mr. Justice WHITE, who was on the bench when *Muller v. Oregon* was decided, and by Mr. Justice VAN DEVANTER and Mr. Justice McREYNOLDS, who were later added, while Mr. Justice BRANDEIS took no part in the consideration and decision of the case. It would therefore seem that only a bare majority of that court is of the same express<sup>4</sup> opinion still.

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<sup>1</sup> Dig. 38, 8, 2. "The proconsul influenced by natural justice promised possession of property to all who by reason of blood kinship are called to the inheritance, although by the civil law they have no claim."

<sup>2</sup> (1908), 208 U. S. 412.

<sup>3</sup> (1917), 243 U. S. 426.

<sup>4</sup> The first three justices simply registered their dissent without an opinion. Their reason for dissent is, therefore, not evident. It is, of course, well known what the opinion of Mr. Justice Brandeis is on the question of the validity of the sociological method, from his brief in *Muller v. Oregon*. Possibly it is because of his connection as counsel with past litigation that he refrains from participation in *Bunting v. Oregon*. In the case of *Merrick v. Halsey Co.*, (1916), 242 U. S. 587 the court said that the form of the constitution is not "so rigid as to make government inadequate to the changing conditions of life." Mr. Justice McReynolds dissented from this opinion.

There has, too, been considerable discussion of the principle of these decisions in our legal periodicals, the most notable of which is perhaps that by Professor Kales in the last volume of the *YALE LAW JOURNAL*,<sup>5</sup> and some caustic criticisms of the method, offered by lawyers and judges.<sup>6</sup>

It is a far cry from the Age of the Antonines to the first years of the Twentieth Century, but the jurisconsult of the earlier period has some remarkable resemblances to the justice of the later time, and the statements of the principle of legal interpretation from the two, placed at the beginning of this paper, go far toward proving the philosophic assumption, that while rules of law may change with the varying circumstances of time and place, the principles of justice or at least the methods of attaining justice through law remain the same.

Gaius, although the greatest of Roman jurists, probably did not have the *jus publice respondendi* which would have put the stamp of supreme authority on what he said, and thus his statements had exactly the same legal value as the utterance of our Justice of the Supreme Court when speaking in dissent; i. e., they were law only in so far as they were in conformity with right reason, that *recta ratio* which Cicero says is the essence of all law. But this expression of right reason afterwards received, in either case, the stamp of sovereignty; that of Gaius, by incorporation in the enacted law of the Digest, that of Holmes, in the unanimous opinion of the Court in *Muller v. Oregon*.

The principle of interpretation laid down by Gaius was sociological. He was dealing with the final stage of development of a rule of inheritance that went back to the primitive period in the Roman

<sup>5</sup> 26 Yale Law Jour. 519-549. "Due Process," the Inarticulate Major Premise and the Adamson Act. In 29 Harv. L. Rev. 683-699, there is a very scholarly and appreciative criticism of "The Constitutional Opinions of Justice Holmes", by Professor Frankfurter, which shows that Holmes' dissent in *Lochner v. New York* is an expression of his settled judicial policy. There is also a full discussion by Professor Frankfurter of the cases leading up to the decision in *Muller v. Oregon*, in 29 Harv. L. Rev. 353-373.

<sup>6</sup> "The great discussion going on as to free judicial decision in the interpretation of statutes is a present professorial agitation which would leave nothing of the general effect of a statute but all to the judgment of the judge." \* \* \* "What the professors coolly propose to the judges is the commission of impeachable offenses." Dr. John M. Zane in "German Legal Philosophy", 16 Mich. L. Rev. 309.

"There is a visible tendency at the moment to subject this country to an alien philosophy of law. It is openly asserted by politicians and philosophers that the development of the common law is not keeping pace with modern thought, and that the common lawyer has too long neglected those higher conceptions which a modern philosophy of the German socialists alone unfolds." \* \* \* "Our present law is in its essence incomparable and inimitable." Judge Robert Ludlow Fowler in "The New Philosophies of Law", 27 Harv. L. Rev. 718.

state. The Law of the Twelve Tables had laid down the rule<sup>7</sup> that in case there was no *agnatus* (descendant through male stock) of an intestate, the *gentiles* (collaterals of the male stock) should take. The effect of this rule was, that if A had a son and a daughter and each married and had a son, the grand-son through the son would take A's estate while the grand-son through the daughter would be cut out. Worse than this, in the absence of an agnate grand-son, the agnate collaterals, the *gentiles*, would take, to the exclusion of the cognate grand-son. This rule, however, was quite in accordance with the spirit of the times in the middle of the fifth century before Christ and there is no doubt that to the Decemvirate, who formulated the rule, it was meant to accomplish just this purpose.

The Law of the Twelve Tables is the first great constitutional document of the Roman state that was passed for the purpose of stressing one side of the ever-present legal antinomy with which we must deal in our pursuit of justice. Law must be certain, otherwise no man can know until he tries how his case is going to be judged. But on the other hand, law must grow, in order to meet the needs of a constantly—though slowly—changing social order with its developing idea of right. This rule of preference for the *agnatus* was established by what in modern phraseology we should call a constitutional convention and should therefore, according to a theory of interpretation still prevalent, be considered "immutable except when changed in the manner therein prescribed."<sup>8</sup> But this emphasis on the rights of the male stock became an anomaly in a more highly civilized society and the rule, which in theory was inflexible, had to change. The method by which the change was brought about is characteristic of the legal-mindedness of the Romans. It would seem that some unknown praetor, using a legal fiction—a device by which a change may be actually made in the spirit of the law while leaving the form apparently unchanged<sup>9</sup>—announced that whenever this question was presented in his court, he would treat the first order of cognates as though they were agnates.<sup>10</sup> The final stage in the change of the law by rational interpretation is shown in the citation from the *Edictum Provinciale* cited above. It is stated that by the *jus civile* the *cognati* have no rights in the property but that the proconsul by an appeal to *aequitas naturalis* gives to them their

<sup>7</sup> *Si intestato moritur, cui suus heres nec escit, agnatus proximus familiam habeto. Si agnatus nec escit, gentiles familiam habeto.* XII Tab. V. 3-5.

<sup>8</sup> Cf. Borgnis v. Falk Co. (1911), 147 Wis. 368. Barnes, J. (Concurring in the decision but disapproving of the theory of interpretation).

<sup>9</sup> Maine, *Ancient Law*, p. 25.

<sup>10</sup> *Gradatim autem admittuntur cognati ad bonorum possessionem: ut qui sunt primo gradu, omnes simul admittuntur.* Dig. 38, 8, 1, 10.

rights, *causa corrigendi juris civilis*. One may note the close parallelism of this judicial process to that of the sociological jurist in the operation of "free judicial decision,"<sup>11</sup> to be discussed later.

If we confine our juridical process within the limits of strict grammatical interpretation, The Law of the Twelve Tables excludes the cognates from the inheritance. It is quite as plain that if we go no further than a logical interpretation, the authorities who laid down the rule *intended* that the cognates should be excluded, but if, with the proconsul cited by Gaius, we go beyond the inflexible letter of the law and the intent of the lawgivers of a remote past, to the sociological needs of the present, the demands of the cognates are recognized as in accord with the current idea of *aequitas naturalis*.<sup>12</sup>

Gaius has here described the final stage in the development of the legal rule. In the primitive period of naive customary law the rule had developed as a usage among the primitive patrician folk of the Period of the Kings. Because of the demand that the law should be written down and thus crystallized in final and unchangeable form, the rule was published in the Twelve Tables as an authoritative expression of the law. But this rule is to be administered by a legal tribunal. The demand for change is met, though grudgingly and slowly, by the awkward juridical device, the legal fiction: the rule is unchanged but its application is extended. The last step is taken in the Golden Age of Roman law when right reason has full sway and the administration of law is controlled by the best legal talent of a learned profession acting in accordance with the dictates of "natural justice."

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<sup>11</sup> Cf. Science of Legal Method: Vol. IX. The Legal Philosophy Series, particularly the essays by Gény, Erlich and Wuzel.

There is another striking application of this same process in the history of Roman procedural law. The *legis actiones* had developed under the pontiffs and, as ecclesiastical and therefore sacred utterances, they were assumed to be immutable. But they became unsuitable for a more highly developed civilization because of their very immutability and consequent narrowness of application. The *praetor peregrinus* by virtue of his *imperium* [delegated sovereignty] substituted the written *formula* for the oral pleadings of the *legis actiones*. Because of the flexibility of this reformed procedure the *praetor urbanus* borrowed the *formula* for use in his court in place of the *actio*. This brought the dispute between the pontiffs and the praetors to a head. Their differences were submitted to the people meeting in their legal assembly, which possessed the same sovereign power that belongs theoretically to the English Parliament. By the enactment of the *Lex Aebutia* and later of the *Lex Julia* this dispute was settled in favor of the more liberal procedure because that brought the procedural law into harmony with the sociological needs of the more highly developed state.

<sup>12</sup> Doubtless Gaius would be much surprised to find that he had anticipated the sociological jurists by more than seventeen hundred years, but it is evident that *aequitas naturalis* here means the equitable doctrine of the *time of Gaius* and not that of the time of the Decemvirate.

It is characteristic of what Dean Pound so aptly calls a "mechanical jurisprudence"<sup>13</sup> to stress the fixity rather than the flexibility side of our juristic antinomy. While Roman juristic thinking was still rational rather than mechanical, Gaius had laid down another rule of interpretation to be followed when there is a conflict of authority. He says,<sup>14</sup> "If the opinions [of the jurists] agree, their decision has the force of a statute; but if they disagree, the *judex* may follow whichever opinion he pleases." This simply states the established law that the *responsa prudentium* are the law of the state, depending for their force upon the *jus respondendi*, conferred upon selected jurists from the time of Augustus.<sup>15</sup> If they are unanimous, there is no chance for conflict of authority, but, if they disagree, and here is the significance of the passage, the *judex*—in this instance the jurymen rather than the judge—is to have complete "judicial freedom of decision."

In marked contrast with this rational rule of a reasonable age is the one laid down in the period of decadence.<sup>16</sup> "But where different opinions are produced, let the greater number of authors prevail. Or, if the number should be equal, the authority of that side should have precedence, on which Papinian may appear, the man of overtowering ability; who prevails against one but yields to two." This is majority rule in its baldest form. The so-called reason is to be found by the simple device of counting noses, with the slight concession in favor of Papinian—the New York or Massachusetts court of his day—that he counts more than one though less than two. It must be said in behalf of this oft quoted and frequently maligned "Rule of Citations of Valentinian" that in a later clause it makes the same concession to reason as is made in the rescript of Hadrian, as cited by Gaius, *supra*, to the effect, that when the opinions of those whose authority is of equal value are cited, then the balanced opinion (*moderatio*) of the judge is to decide. Unfortunately the rational part of the edict was rarely appealed to, but the rule was applied as a mechanical device and as though it were a mathematical axiom which announced an ultimate unchangeable truth. In the succeeding ages of intellectual feebleness this mechanical rule of interpretation being easy to apply, was much oftener followed than the rational one laid down by Gaius and adopted

<sup>13</sup> 8 Columbia Law Review, 605.

<sup>14</sup> Institutes I, 7.

<sup>15</sup> *Primus divus Augustus, ut major juris auctoritas haberetur, constituit, ut ex auctoritate ejus responderent.* Dig. I, 2, 2, 49.

<sup>16</sup> Cod. Theod. I, 4, 3.

by Justinian, who states the rule of reason in its most unequivocal terms.<sup>17</sup>

It must be acknowledged that the Roman jurists had a much easier task than has the American justice in squaring their theory of interpretation with the law and constitution of their state. Although our division of the functions of government into executive, legislative and judicial is as old as Aristotle,<sup>18</sup> the Romans apparently never recognized it as a fundamental classification of governmental powers, though they worked out experimentally a very effective system of checks and balances for the operation of the different functions of delegated sovereignty, by the progressive subdivision of the magistracy and by the growth in the powers, first, of the primary assemblies with sovereign legislative authority and, later, by the indirect influence of the senatorial order. Because of this difference between the constitutional principles of the Roman state and our own constitutional provisions, the Roman jurists seem never to have thought of interpretation of law as being in any way involved with the other question of the limitations on the powers of the executive, the legislature or the judiciary. It should be noted, however, that if we once admit that interpretation of law in any civilized society belongs to the most highly trained members of a learned profession acting in accordance with the right reason of the time and place, it makes no difference whether we find this class in a legislative committee, a bench of judges, or a magistrate learned in the law and endowed with the power of interpretation.

This difficult question of hermeneutics, as to how a legal doctrine may be retained as the same principle and yet expanded or changed so as to meet a new situation, re-appears in the revised Roman law of the period of the Renaissance. After the Glossators<sup>19</sup> had gone to seed on their method of merely verbal or grammatical interpretation of the ancient texts of the law, which were considered immutable, and capable only of explanation but not of development, the Commentators carried on their work by the introduction of a dialectic method which elaborated the law through log-

<sup>17</sup> *Nemo iudex vel arbiter existimet neque consultationes, quas non rite iudicatas esse putaverit, sequendum, \* \* \* (cum non exemplis sed legibus iudicandum est.) \* \* \* sed omnes iudices nostros veritatem et legum et justitiae sequi vestigia sancimus.* Cod. 7, 45, 13.

<sup>18</sup> Politics 6, 14, 1. Maine in his *Popular Government*, p. 219 and notes, gives an account of the modern history of this device showing that Madison was influenced by Montesquieu.

<sup>19</sup> See Calisse's *History of Italian Law*, translated in the *Continental Legal History Series*, Vol. I, p. 137, ff.

ical reasoning and discussion. The later Glossators had "developed the rule of taking for law whatever some authority had once asserted and of deciding (when there were opposing opinions on the record) by the number of opinions on one side or the other." Among the Commentators, who succeeded the Glossators, Bartolus attained rank similar to that held by Papinian in the classic Roman law, but his decadent followers embraced in its entirety the doctrine of *communis opinio* or weight of opinion, and thus they, too, were landed in the same morass of legal contradictions as were the Roman lawyers of the period of decadence by their slavish use of Valentinian's Law of Citations and as are the courts of the present day that rely upon the "weight of authority" or "majority opinion." The Humanists who succeeded the Commentators corrected their short-comings by an appeal to an "inarticulate major premise" drawn from the principles of natural law as then understood, which was assumed to contain "the dictates of right reason which tells whether men's actions conform to justice." Although this "natural law," to which appeal was made, has since been shown to be a somewhat fanciful concept and is now decidedly out of style among legal philosophers, nevertheless, the method of expansion of law by the Humanists through an appeal to the current sense of justice is the same as that of our present day sociological jurists.

English jurists have never troubled themselves particularly about the theoretical validity of this method of interpretation, probably because it has been practically taken as a matter of course. In the first place, they have not had before them the apparent barrier of the sharp segregation of functions that is implied by our constitutional separation of governmental powers between the executive, the legislature and the courts, and the further, *gratuitous*, assumption that the interpretative function belongs exclusively to the one or the other of these departments. In the second place, the growth of equity along side of the common law has been a constant reminder that there is always an appeal from the rigid letter of the law to the principles of *bona fides* and *bona conscientia*, which are in accord with the current sense of justice. Indeed, one of the best definitions of equity by an English jurist<sup>20</sup> is an express recognition of the validity of the sociological method of interpretation of law.

<sup>20</sup> "The judicial modification or supplementing of existing rules of law by reference to *current* morality." Clark, *Practical Jurisprudence*, p. 373.

The sociological jurisprudence of today may be looked at as a new equity or at least as an equitable appeal to a present-day, living and growing *bona conscientia*. The criticism of sociological equity rather out-does Selden's reference to the equity of his day as a 'roguish thing, measured according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity' (Cf. note 6, *ante*).



Then, too, the great statutes, such as *De Donis* and the Statute of Uses, which have been worked into the web and woof of our Common Law, have been so incorporated and in most instances completely transformed by this very process.

The nineteenth century codes of the Continental European states, beginning with the great French Civil Code have attempted different solutions of the problem of interpretation. Article 5 of the French Code<sup>21</sup> forbids judges to pass judgment which in our phraseology would make a binding precedent, but a preceding article imposes a penalty upon judges who refuse to give a decision on the pretext that the law does not cover the case.<sup>22</sup> It would seem that the combined effect of these two provisions would be to force the exercise of free judicial decision of any particular case in which it was called for, but that such decision would not add to the body of legal principle. Later legislation, however, would seem to give the *Court de Cassation*, by repeated decisions on the point, the power to crystallize the principle into "a rule of guidance for the particular case."<sup>23</sup> "But there are still from time to time declaratory laws (*lois interpretatives*) brought forward by the government in order to put an end to uncertainties in the practical application of law, sometimes on its own initiative, sometimes upon petition."<sup>24</sup> This apparently leaves the last word with the legislature and not with the judiciary. However, Géný says that free discretion belongs to the judiciary and that "it has a broader sweep where it can be exercised outside of all formal legal sources."<sup>25</sup>

The French Revolution established liberty and equality as basic categories of law and justice. Our own Declaration of Independence and various bills of rights have adopted these as fundamental principles of administrative justice. It is therefore no accident that the discussion of the interpretation of "Liberty" has occupied the jurists of the Continent and the justices of our courts during the past century.

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<sup>21</sup> The French Civil Code, Translated into English by E. Blackwood Wright, LL.D.

<sup>22</sup> Op. cit. Art. 4.

<sup>23</sup> Op. cit. Art. 5, Note (c).

<sup>24</sup> Planiol, *Traité élémentaire de droit civil*, I, s. 210, translated by Pound, at p. 20, in his *Readings in Roman Law*, to which I am indebted for preceding references.

<sup>25</sup> *Science of Legal Method*. Modern Legal Philosophy Series, Volume IX, p. 4. This work contains a number of essays by Continental jurists: French, German and Austrian, and by American jurists: Pound, Freund, Wigmore, Kocourek and Alvarez, of Chile. All discuss the general theme of the interpretative function of the courts. This paper began as a review of the *Science of Legal Method*. As it grew to large for that purpose the review proper was published in 16 Mich. L. Rev 463 and the development of the principle in our own courts was more carefully worked out and brought into relation with the manifestations of it in classical Roman and mediaeval law.

The obligation of private contract is guaranteed by the French Civil Code,<sup>26</sup> but Gény says that here as everywhere else the formal rules are not sufficient for the administration of the law in all cases, and by taking advantage of the method of free judicial decision we "may and should establish new rules to supply what is omitted in the statutes and the customary law in order to put into full effect the principle of the autonomy of the will of the parties."<sup>27</sup> But it is evident that if the will of the parties has found in the law no set formula which it could use, it must have proceeded in accordance with the 'moral, psychological, economic, in brief, the social circumstances under which it tried to accomplish its aim.'<sup>28</sup> It follows therefore that we must cease to look at a contract solely from the standpoint of the "psychological idea of agreement" but will have to interpret it in its relation to all the facts of the life of society. The will of the parties is not then the sole criterion of interpretation, for while the greatest possible satisfaction must be given to the desires of the parties yet they must be made consistent with the social purposes of mankind, and in the administration of the law there must be a "judicious comparison of all the interests involved, with a view to balancing them against each other in conformity with the interests of society." "Thus the courts are led without exceeding the well known limits of private law, whenever they have no formal guidance furnished by statute or established custom, to search for light among the social elements of every kind that are the living force behind the facts they deal with, if they wish to proceed with any assurance of being right."<sup>29</sup>

At the beginning of his paper on Methods of Judicial Thinking, Wurzel says that he proposes to treat the subject not from a philosophical but from a juridical standpoint.<sup>30</sup> He is dealing with the practical problem found in the other chapters of the Science of Legal Method, namely, the extension of statutory law by proper methods of juridical thinking to meet new situations and establish new rights. He, in common with all other continental jurists, starts

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<sup>26</sup> French Civil Code, Sec. 1134. Agreements formed according to law bind those who make them. \* \* \* Agreements must be carried out in good faith. Sec. 1156. In construing agreements one must seek to ascertain what was the common intention of the parties, rather than be tied down by the literal meaning of the terms used. The references to Gény are taken from the essay on Judicial Freedom of Decision in the Science of Legal Method. See note 25.

<sup>27</sup> Science of Legal Method, p. 23.

<sup>28</sup> *Ibid.*, p. 24.

<sup>29</sup> *Ibid.*, pp. 38, 45.

<sup>30</sup> *Ibid.*, pp. 286-428. The succeeding quotations are taken from various parts of this essay.

with the statute as a statement of the basic law of the state at the time and in the place and environment of its enactment.

This basic law embodies a concept and it has been assumed that juridical thinking consists (1) in an interpretation of the concept expressed in the legal rule, (2) the reconstruction of the intention of the legislator and (3) possibly in addition the employment of analogies. Wurzel however gives us an ingenious elaboration of these processes by which the central concept is carried out into the surrounding penumbra of legal concepts. He calls this "projection" and defines it as "the extension of a concept found in formulated law to phenomena which were not originally contained in the concept, or at least were not demonstrably a part of the group of images forming the concept, without at the same time changing the nature of the concept as such." He would represent the concept graphically not as a geometrical figure, but as a photograph with vague and gradually diminishing outlines, so that one can not tell where the picture proper ends and the background begins, but it is in this back ground that the concept found in formulated law is projected into the world of actual phenomena. Suppose a statute passed in 1700 imposes a tax on mills "run by machine power" *Quaere*: Does it apply to steam or electric mills? If this law were to be interpreted by the first two rules laid down above it is plain that "machine power" could refer only to machines driven by wind or water. It is equally evident that the legislators of 1700 could not have any "intention" of taxing mills run by steam or electricity. But we reach the conclusion by "projection" that the law imposes a tax on mills of the modern type. "We attach the new phenomena to the old concept as an integral part, although it was not originally contained in it—in short we project the old concept into the new phenomena," the connecting link being the "economic and physical data which in the meantime had become part of the meaning of the term 'machine' as used in ordinary language." It is by this device that the legal system may adapt itself to the movements on the shifting surface of social life. By means of projection, social influences find entrance into the body of the law and the rights and liabilities of parties are always to be determined "in accordance with the notions of the present age, and never according to what the legislator may have thought when the law was made." With proper training in the sociological method lawyers "will cease to conceive of the law as a mere naked command and learn to comprehend its nature as a social phenomenon."

It is evident that the same solution of the antinomy mentioned above is suggested both by the French professor and the Austrian

jurist, each working out from his national code and applying the method to his own juristic environment. Kohler, the leading advocate of the sociological jurisprudence, has applied this method to the interpretation of the German Civil Code. He lays down this principle "Rules of law are not to be interpreted according to the thought and will of the law-maker, but they are to be interpreted as products of the whole people, whose organ the law-maker has become."

In Dean Pound's article on Courts and Legislation we find the principles of juridical thinking above outlined applied to our own American law. He makes perfectly plain that this "relation of the courts to legislation is neither a new question nor a local question"<sup>31</sup> but he does not state in express terms that the solution suggested is not "judicial legislation" but that the question is merely as to the character and limits of the universally acknowledged power of the judiciary to interpret the law. It is this apparently that the critics have seized upon for such severe denunciation.

Most of the interpretation in the American courts is of the grammatical or logical type or of a combination of the two, but the more liberal courts are beginning to recognize that the social needs to be served by their decisions are quite within their competence. Perhaps no better way of comparing the two juridical methods can be found than to consider the conflicting decisions of some of our great courts on practically the same state of facts. The decisions all involve the question of interpretation of the word "liberty" as used in the Fourteenth Amendment to our Constitution.

The difficulties of liberal interpretation are greater under our American system of government than on the Continent or in England. According to the stock theory, the Continental codes can be changed only by the legislative bodies that promulgated them. If this theory were rigidly adhered to, interpretation could not go beyond the grammatical or logical stage; sociological interpretation would be barred. Under our own system we have back of the statute a written constitution which is popularly supposed to be absolutely rigid, capable of change only by amendment, and this theory of the Constitution seems to be still held by many lawyers and by some respectable courts. This difficulty is not so acute in England which, if it has a constitution at all, has one that in Bryce's phraseology is a flexible and not a rigid one.<sup>32</sup> We also have the further

<sup>31</sup> *Ibid.*, p. 204 Dean Wigmore says in plain terms that "the judiciary have in fact occupied themselves at all times with declarations of law independent of statute, i. e., with genuine legislation. Cf. Editorial Preface to the Science of Legal Method, p. xxx.

<sup>32</sup> Bryce, *Studies in History and Jurisprudence*, Essay III. Flexible and Rigid Constitutions.

difficulty that our Constitution makes the cleavage between the legislative and the judicial function much more sharply defined and, although *Maybury v. Madison* may have established that interpretation is a judicial function, the question as to what interpretation is and how far it may go, still arises to trouble us. The segregation of legislative from judicial functions and the enclosure of each in air-tight compartments certainly makes for rigidity in the administration of our laws. Nevertheless in spite of these handicaps it may be shown that some of our courts, under what was felt to be a compelling force of social need have surmounted the difficulty.

It should be borne in mind that our conflict here is not between the meaning of *lex*, enacted law, and *jus*, traditional law, nor is it the other long discussed question as to the source of law, whether sovereign power or natural growth, but it is the deeper antinomy of fixity *versus* flexibility in law and the reconciliation of the two in such a way as to secure the more perfect justice.

The provision of our Constitution that no State shall "deprive any person of life, liberty or property without due process of law,"<sup>33</sup> protects by constitutional provision, liberty to contract, just as the French Civil Code<sup>34</sup> by statutory provision assures the obligation of contract. The Constitution of the State of Illinois has a provision identical with that of the Constitution of the United States, Amendment XIV, section I, above cited. The various interpretations of "liberty" and "due process" by our supreme courts show that the problem of free judicial decision is the same in America as in Continental Europe though probably more difficult of solution with us.

In the case of *Ritchie v. The People of the State of Illinois*<sup>35</sup> the court rested its decision squarely on the proposition that in determining the meaning of the Constitution as the fundamental law the court may not go beyond the grammatical interpretation of the words themselves and the intent of the framers of the instrument at the time it was fashioned. An act of the legislature<sup>36</sup> said, "No female shall be employed in any factory or workshop more than eight hours in any one day." This provision was held unconstitutional and void because the legislature cannot "interfere with the

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<sup>33</sup> XIV, Amend., Sec. 1.

<sup>34</sup> Cf *ante*, Note 26. It may be observed that the French Code guarantees the obligation of contract, thus making the code provision more closely analogous to that of Art I, Sec. 10 of our Constitution than to Amend. XIV, Sec. 1, but the principle involved in the interpretation under the Code is the same as that under the Constitution.

<sup>35</sup> (1895), 155 Ill. 98.

<sup>36</sup> Laws of Illinois, 1893, Sec. 5.

freedom of contract between the workman and the employer," nor can the legislature "invade the rights of person and property under the guise of a mere police regulation." The theory of interpretation apparently held by this court has been most clearly enunciated in an opinion of the Wisconsin Supreme Court.<sup>37</sup> "I regard our constitutions as immutable except when changed in the manner therein prescribed. \* \* \* To hold otherwise is to say that the courts may change our fundamental laws. This would be a clear usurpation of power never vested nor intended to be vested in the courts, and one which was reserved to the people themselves."

The Illinois court decided that the Act of 1893, prohibiting the employment of females in any factory or workshop for more than eight hours a day was unconstitutional because it deprived the woman of the "liberty" to make her own contract and the word "liberty" was interpreted in accordance with the grammatical meaning of "freedom to act" and with reference to what the constitution makers "intended" by its use. The question as to whether interpretation was a judicial or a legislative function need not be considered. The Illinois court in a later decision<sup>38</sup> held that a statute limiting women to ten hours work in one day was constitutional. The court attempts to reconcile the two decisions by saying that the Act of 1909 showed on its face that it was "passed for the purpose of promoting the health of women" and was therefore justified under the police power; with the intimation that if the earlier act had been a ten-hour law, the result in the earlier case might have been different. It may also be significant that Mr., now Justice, Louis Brandeis submitted a brief in the later case. Prior to this later Illinois case the question had come up in the New York Court of Appeals and in the United States Supreme Court.<sup>39</sup> The New York court decided that a ten-hour law for bakers "is an exercise of the police power of the legislature relating to the public health and therefore violates no provision of the State or Federal Constitutions." The United States Supreme Court held that there was in this instance not a legitimate exercise of the police power of the State and "under such circumstances the freedom of master and employee to contract with each other \* \* \* cannot be prohibited or interfered with, without violating the Federal Constitution." There was a strong dissenting opinion in this case by Mr.

<sup>37</sup> *Borgnis v. Falk Co.*, (1911), 147 Wis. 368, Barnes, J. (concurring in the decision but disapproving the theory of interpretation. Cf. n. 8, *supra*).

<sup>38</sup> *Ritchie v. Wayman*, (1910), 244 Ill. 509, establishing the validity of the enactment in Laws of 1909, at p. 212.

<sup>39</sup> *People v. Lochner*, (1904), 177 N. Y. 145. This case was taken to the Supreme Court of the United States in *Lochner v. New York*, 198 U. S. 45.

Justice HARLAN, with whom Mr. Justice WHITE and Mr. Justice DAY concurred. Mr. Justice HOLMES also wrote a dissenting opinion in which occurs the statement cited at the beginning of this paper.

In 1903 the legislature of the State of Oregon<sup>40</sup> passed a law providing: "That no female shall be employed in any \* \* \* \* laundry \* \* \* \* more than ten hours during any one day." The constitutionality of this law was called in question and, in *Muller v. Oregon*,<sup>41</sup> the United States Supreme Court decided that the law was constitutional. An elaborate brief was submitted by Mr. Louis Brandeis in this case, citing legislation in various States and in foreign countries regulating the hours of labor for women, together with extracts from more than ninety reports of various committees, bureaus of statistics, and commissioners of hygiene to show the deleterious effect upon women and upon society of prolonged hours of labor. In declaring the law constitutional Mr. Justice BREWER who delivered the opinion for a unanimous court said, "it is the peculiar value of the written constitution that it places in unchanging form limitations upon legislative action and thus gives permanence and stability to popular government which would otherwise be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. *We take judicial cognizance of matters of general knowledge.*" (The italics are not the Court's.) In the more recent case of *Bunting v. Oregon*,<sup>42</sup> the United States Supreme Court again decided in favor of the validity of a ten-hour law for men, intimating that whether it was necessary for the preservation of health was a question for the state legislature and the state supreme court, when the record contains no facts to support the contrary intention. It may be seen by a review of these cases that our courts have declared that a sociological interpretation of law is constitutional and legal, although it seems that no court has used the term "sociological," which is taboo with many of our conservative lawyers.

It is not necessary to determine how far the courts have gone in their delimitation of the interpretative function of the legislature

<sup>40</sup> Session Laws, 1903, p. 148.

<sup>41</sup> *Muller v. Oregon*, (1907), 208 U. S. 412.

<sup>42</sup> *Bunting v. Oregon*, (1916), 243 U. S. 426. It should be noted that although there was no dissent in *Muller v. Oregon*, in the later case three judges out of eight dissent. Cf. *ante*, note 4.

<sup>43</sup> Freund, *Police Power*, Sec. 3.

and of the court in order to prove the validity of this method of interpretation. If we are dealing with a constitutional question we need ask only whether the legislature may interpret a constitutional provision not alone by reference to the meaning of the words and the intent of the framers of the constitution at the time the constitution is made, but also whether we may appeal to the social environment and needs at the time the legislation is adopted. When the courts are interpreting a statute they must consider not only the meaning of its words and the intention of the legislators at the time the statute was passed but also whether it is within the competence of the court to appeal to the social environment at the time of the application of the statute.

In the case of *Ritchie v. Illinois*, *supra*, the court reached the conclusion that an eight-hour law for women was contrary to the Fourteenth Amendment and to the similar provision in the Illinois Constitution, and refused to invoke the "police power" in order to save the statute, because the rights of person and property cannot be invaded under the guise of a police regulation. In the later Illinois case, *Ritchie v. Wayman*, *supra*, a ten-hour law for women was declared constitutional as a valid and legitimate exercise of the police power of the State. The ten-hour law for bakers was declared valid by the New York Court (*People v. Lochner*, *supra*) as a proper exercise of the police power and the same law was declared invalid by the United States Supreme Court (*Lochner v. New York*, *supra*) because it was not a legitimate exercise of the police power. The significant feature of all these decisions for our purpose is that the "police power" was used as the test of validity in every instance. But Freund says,<sup>43</sup> "the police power [is] not \* \* \* a fixed quantity but [is] the expression of social, economic and political conditions. As long as these conditions vary, the police power must continue to be elastic, i. e., capable of development." The Ohio Supreme Court says "The authority to ascertain facts, and apply the law to the facts when ascertained, pertains as well to other departments of government as to the judiciary."<sup>44</sup> The United State Supreme Court has decided that "whether or not a state has ceased to be republican in form, within the meaning of the guaranty of the U. S. Const. art. 4, s. 4, because it has made the referendum a part of the legislative power, is not a judicial question but a political one, which is solely for Congress to determine."<sup>45</sup> The Court thus declares that when the legislative depart-

<sup>43</sup> The State ex rel. v. Harmon, (1877), 31 Oh. St. 259. Cf. 147 Wis. 349.

<sup>45</sup> Cf. Ohio ex rel. Davis v. Hildebrant, (1916), 241 W. S. 565.



ment has exercised its interpretative power on the word "republican," the judicial department will not change the conclusion. There seems little reason to doubt that the legislative branch in interpreting the term has actually followed the sociological method. The word, "republican," grammatically means "representative" form of government and not a primary democracy, and no one can read the discussions of the subject at the time the Constitution was adopted without being convinced that the framers of that instrument *intended* to form a representative republic, not a pure democracy. The "police power," then, and the determination of its applicability belongs both to the legislatures and the courts, but the invocation and application of the "police power" is nothing more than an appeal to the sociological method of interpretation of our constitutions and laws.

That the courts have at last reached this theory of interpretation is somewhat obscured by the way in which the cases are reported. Mr. Justice HOLMES does state the theory clearly and concisely in *Lochner v. New York*, *supra*, but unfortunately this is in a dissenting opinion. The "[in] articulate major premise" to which he refers is the dominant sociological interpretation of the word "liberty" at the time of the enforcement of the law and not the grammatical interpretation of the word nor the "intention" of the framers of the amendment to the constitution. He says, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," and further, "Every opinion tends to become a law. I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion."<sup>46</sup> When the doctrine was finally adopted into our law, the "inarticulate major premise" of Mr. Justice HOLMES was relegated to a foot-note<sup>47</sup> in the opinion, but it was the very elaborate and convincing report, in this note by Mr. Brandeis, as to the social and economic influence of long hours of labor for women, in regard to which the court said, "We take judicial cognizance of all matters of general knowledge." Referring to the note of Mr. Brandeis' the court says: "The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation re-

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<sup>46</sup> 198 U. S. 75.

<sup>47</sup> 208 U. S. 419.

stricting or qualifying the conditions under which she should be permitted to toil."

We may then conclude that sociological jurisprudence, at least so far as it affects interpretation, is not borrowed from the "philosophy of the German Socialists." In the form of freedom of judicial decisions it has existed in Roman law from the classical period, at least, and has re-appeared in slightly changed form in all the modern derivatives of Roman law. It has also existed from the earliest times in our own Common Law and has finally been made both legal and constitutional by adoption in our highest courts, and this too not as a borrowing from an alien system but as a judicial recognition of an imperative social need. If, along with our English jurists, we are afraid of the term metaphysics or philosophy we may think of it as a science. If, as is the case with some American judges, we are frightened because of the likeness of the term sociological to socialistic, we may well call it a rational and not a sociological jurisprudence; and if we want to get squarely onto a legal and constitutional basis we may, since the late decisions in the United States Supreme Court and in the courts of a number of our states, think of it as due process of law; and at the same time comfort ourselves with the reflection that it is in accord with good public policy and a developing idea of justice. "When an eighteenth century constitution forms the charter of liberty of a twentieth century government must its general provisions be construed and interpreted by an eighteenth century mind in the light of eighteenth century conditions and ideals" asks Mr. Justice WINSLOW, of the Wisconsin Supreme Court, and we may answer as does he, "Surely not. This were to command the race to halt in its progress, to stretch the state upon a veritable bed of Procrustes."<sup>48</sup>

It may then be properly said, not only that a sociological interpretation of law is legal and constitutional, even under our own judicial system with its rigid limitations on the powers of the judiciary and the legislature; but also that such a method of interpretation is apparently inevitable in every system and at all times whenever the law has reached the stage at which its development is entrusted to a class of legal experts. This conclusion ought to be equally acceptable to the philosophical jurist or student of comparative law, whose only purpose is to make the law more rational and more just; to the judge, whose sole business it is to decide cases and decide them right; but particularly to the scholarly lawyer who, like the old Roman jurisconsult, may thereby make his influence felt in the

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<sup>48</sup> *Borgnis v. Falk Co.*, 147 Wis. 327.

scientific development of our law. A juridical process that has been endorsed and adopted by Gaius and Justinian, by Bartolus and the Humanists, by English Justices of the King's Bench and Chancellors in Equity, by Continental jurists and American legalists and finally by Justice HOLMES, Justice BREWER and the United States Supreme Bench can hardly be waived aside as the academic vaporings of professorial theorists. It would seem rather to be a part of the much lauded "Natural Law" or of what is called in modern phraseology, philosophic justice.

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